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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

KEVIN T. ROOT and DALE E. ANSTINE, P.C.,

Petitioners,

v.

BOLLMAN HAT COMPANY, as Sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Should an ERISA plan be required to bear a proportional share of attorney's fees and costs incurred by a plan beneficiary in pursuing a third party lawsuit?

2. Does ERISA preempt the state law common fund doctrine?

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PETITION FOR WRIT OF CERTIORARI

Kevin T. Root and Dale E. Anstine, P.C. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 18, 1997, in order to resolve the conflict between the Third and Seventh Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is reprinted in Appendix A. *Bollman Hat Co. v. Root*, ___ F.3d ___ (3d Cir. 1997). ("App. A") at page App. 1. The memorandum opinion and order of the Honorable Judge Huyett of the United States District Court for the Eastern District of Pennsylvania is reprinted in Appendix B. *Bollman Hat Co. v. Root*, No. 94-7569 (Jan. 31, 1996, E.D. Pa). ("App. B") at page App. 15. By order filed May 15, 1997, the Third Circuit denied the petition for rehearing. ("App. D") at page App. 19.

JURISDICTION

On April 18, 1997, the United States Court of Appeals for the Third Circuit issued an opinion and order reversing the judgment of the United District Court for the Eastern District of Pennsylvania and remanded the case to the District Court with direction to enter judgment

consistent with the Court's opinion. On June 3, 1997, the United States Court of Appeals for the Seventh Circuit issued an opinion and order in the case of *Blackburn v. Sundstrand Corp.*, ___ F.3d ___ (7th Cir. 1997), which is in direct conflict with the opinion of the United States Court of Appeals for the Third Circuit in the instant case. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. ("App. E") at page App. 21.

STATEMENT OF THE CASE

The district court for the Eastern District of Pennsylvania held that the Bollman Hat Company's lien, asserted pursuant to a qualified ERISA plan, could be reduced to reflect a pro-rata share of attorney's fees and costs incurred by Kevin T. Root in pursuing a third party claim. The Circuit Court of Appeals for the Third Circuit reversed and remanded holding that the unambiguous terms of the plan document required full reimbursement to the ERISA plan without reduction for attorney's fees and costs. Root's petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Opinion Directly Conflicts With The Seventh Circuit's Ruling in *Blackburn*.

The decision below is in direct conflict with the Seventh Circuit's decision in *Blackburn*. Certiorari is appropriate here. *See Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1986). The Ninth Circuit in *Blackburn* held that the ERISA statute did not preempt the Illinois common fund doctrine. The court stated that the common fund doctrine long pre-dates not only ERISA but employer-sponsored health plans. The common fund doctrine which arises under state common law is not "related" to an ERISA plan simply because it affects the net amounts the plan must pay for healthcare. In fact, as the *Blackburn* court cogently pointed out, application of Illinois state law might even increase an ERISA plan's recovery. The ERISA plan could have hired its own lawyers to sue the third party tortfeasor who injured the Blackburns, but its net recovery might have been even lower than the amount left after paying the Blackburns' lawyer. The court concluded that the effect of the common fund doctrine upon ERISA plans is incidental, and that therefore ERISA did not preempt the state common fund rule.

The Third Circuit Court in *Bollman Hat Co. v. Root*, ___ F.3d ___ (3d Cir. 1997) held that an ERISA plan's lien should not be reduced by a pro-rata share of attorney's fees and costs in obtaining a third party recovery, relying on its opinion in *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996). The Third Circuit's opinion, in both *Ryan* and *Root*, is that because the ERISA statute is

silent on the issue of subrogation, then an application of the state law common fund doctrine would in effect create federal common law establishing substantive ERISA rights when there was no showing that an adoption of the common fund doctrine was necessary to effectuate the policies of ERISA.

Blackburn presents the better reasoned approach. State common law principles do not conflict with ERISA's language, but promote the values which Congress favored when passing this legislation, which should reflect the equitable principle that a subrogated ERISA plan share in the cost of recouping paid benefits. The common fund doctrine developed under state common law will have only an incidental effect on ERISA plans, and may in fact result in ERISA plans obtaining a larger reimbursement in the long run. However, the common fund doctrine does not relate to ERISA plans in the same manner as the state of Pennsylvania's anti-subrogation law which was held to be preempted by ERISA by this Court in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

While *Blackburn* effectuates the realities of third party litigation where an ERISA plan has a subrogation interest, the decision below has set an interpretive course destined to delete common law principles from the body of law used to analyze contracts subject to ERISA's provisions. Congress never intended the result reached by the Third Circuit Court. The Third Circuit Court's precedent will effectively remove years of well-conceived judicial thought from consideration, and permit employers and other benefit providers to write agreements which are inequitable, and which would otherwise never be

enforced in a state court. The conflict is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1191

BOLLMAN HAT COMPANY

v.

KEVIN T. ROOT;
DALE E. ANSTINE, P.C.

Bollman Hat Company, as sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-07569)

Argued January 14, 1997

Before: SLOVITER, Chief Judge,
GREENBERG and SCIRICA, Circuit Judges

Filed APR 18 1997

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OPINION OF THE COURT

SCIRICA, Circuit Judge.

This appeal involves an ERISA plan's subrogation rights, specifically whether a plan must contribute to the legal expenses of a plan participant's recovery against a third party. We addressed this issue in *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996), decided after the district court here rendered judgment. In this appeal we are asked to distinguish *Ryan* or in the alternative to reconsider our holding in *Ryan*.

I.

Bollman Hat Company sponsors a self-insured, ERISA-regulated employee benefit plan. After a Bollman employee, Kevin Root, was injured in a motorcycle accident, the Plan paid him $100,197.92 for his medical expenses. Thereafter, Root sued the third party responsible for his personal injuries and obtained a $215,000.00 settlement.

Bollman sought full reimbursement from Root in accordance with §10.8 of the Plan, which provides:

> In the event of any payment under the Plan to any covered person, the Plan shall, to the extent of such payment, be **subrogated**, unless otherwise prohibited by law, to **all** the rights of recovery of the covered person arising out of any claim or cause of action which may accrue because of alleged negligent conduct of a third party. Any such covered person hereby agrees to reimburse the Plan for **any** payments so made hereunder out of any monies recovered from such third party as the result of judgment, settlement, or otherwise. . . .

(emphasis added). Root complied with Bollman's request for reimbursement in part, but withheld $30,507.13 to pay a portion of the attorney's fees and costs incurred in obtaining the third party settlement.

Bollman contends the terms of the Plan require full reimbursement and do not allow Root to withhold money for attorney's fees. Bollman also maintains Root expressly agreed to full reimbursement when he signed a Reimbursement Agreement before receiving the $100,197.92 from the Plan. The Reimbursement Agreement provides:

> I, Kevin T. Root, understand and acknowledge that my medical plan has a reimbursement provision which provides that medical benefits paid under the plan are to be reimbursed **up to the amount of such benefits paid** from any payments, awards or settlements which may be paid by any third party.

(emphasis added).

As sponsor of the Plan, Bollman brought suit against Root in district court for $30,507.13.[1] Following stipulations of fact and cross-motions for summary judgment, the district court granted summary judgment to Root. Finding Root's personal injury litigation substantially benefited Bollman, the district court held Bollman would be unjustly enriched if Root bore the full burden of litigation costs. Bollman appeals, citing our intervening decision in *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996).

II.

Bollman states in its complaint that jurisdiction arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461. A case may arise under ERISA where the suit is filed by a plan sponsor who is also a fiduciary. *See Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 153 (3d Cir. 1985) (we must "narrowly

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[1] The parties stipulated that $30,502.13 [sic] is the amount due if defendants prevail. Bollman named as a defendant Dale Anstine, P.C., who holds the disputed $30,507.13 in an escrow account pending resolution of this matter.

and literally" interpret ERISA's civil enforcement provision, 29 U.S.C. §1132, which allows only a participant, a beneficiary, or a fiduciary to sue). A plan sponsor is a fiduciary only "to the extent" it acts in a fiduciary capacity. 29 U.S.C. §1002(21)(A) (definition of "fiduciary"). *See also Malia v. General Elec. Co.*, 23 F.2d 828, 833 (3d Cir.), *cert. denied*, 115 S.Ct. 377 (1994).

Bollman has limited the "extent" to which it is a fiduciary by delegating some of its fiduciary duties. At least one circuit has held a suit brought by a plan sponsor as a fiduciary does not arise under ERISA unless the action is related to the fiduciary duties retained by the plan sponsor. *See Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996). *Cf. Northeast Dep't*, 764 F.2d at 154 ("[O]ne's status as fiduciary under ERISA is dependant upon one's relationship to a particular plan.") It is unclear whether Bollman retained fiduciary duties which are in any way relevant to this lawsuit. But we do not need to resolve this issue here. Even if our jurisdiction does not arise under the statute itself, we nonetheless have jurisdiction arising under the federal common law developed pursuant to ERISA. *See Airco Indus. Gases, Inc. Div. of the BOC Group, Inc. v. Teamsters Health and Welfare Pension Fund of Philadelphia and Vicinity*, 850 F.2d 1028, 1033-34 (3d Cir. 1988) (ERISA case may arise under federal common law where it does not arise directly under the statute).

Federal question jurisdiction will support claims arising under federal common law as well as those of a statutory origin. *See Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 100 (1972). A case arises under federal common law if the issue presented is one "of central concern" to

ERISA. *Airco*, 850 F.2d at 1033 (quoting *Franchise Tax Bd. of the State of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 26-27 (1983)). This is such a case. *See, e.g., Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 991 (4th Cir.) (holding the issue of "whether federal courts should impart unjust enrichment principles into the gaps left by ERISA" is one of central concern to the statute), *cert. denied*, 498 U.S. 982 (1990); *Northeast Dep't*, 764 F.2d 147 (we have federal question jurisdiction to determine a question that implicates ERISA).

We have jurisdiction under 28 U.S.C. §1291. Our review of the district court's grant of summary judgment is plenary. *See Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123, 125 (3d Cir. 1996).

III.

Shortly after the district court granted Root summary judgment, we held in *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996), that an ERISA plan participant whose third party recovery is subrogated to the plan may not withhold attorney's fees where the plan unambiguously requires full reimbursement. *See id.* at 127. Bollman contends this case is indistinguishable from *Ryan*.

A.

The Ryans were employees of Federal Express and participants in its ERISA plan. After Mrs. Ryan gave birth to a daughter with cerebral palsy and severe brain damage, the Federal Express plan paid medical expenses.

Meanwhile, the Ryans brought suit for medical malpractice. After the suit was settled, the Federal Express plan demanded full reimbursement. The Ryans refused, insisting on withholding a portion of counsel fees incurred in pursuing their medical malpractice claim.

The Federal Express plan's subrogation provision provided, "[I]f benefits are paid on account of an illness resulting from the intentional actions or from the negligence of a third party, the Plan shall have the right to recover, against any source which makes payments or to be reimbursed by the Covered Participant who receives such benefits, 100% of the amount of covered benefits paid." *Ryan*, 78 F.3d at 124.

The Ryans sued Federal Express. The district court granted the Ryans summary judgment based on the common law doctrine of unjust enrichment. On appeal, we reviewed the reach of federal courts to apply common law doctrines in ERISA actions and reversed, holding that common law may not "override a subrogation provision in an ERISA-regulated plan on the ground that the plan would be unjustly enriched if it were to be enforced as written." *Id.* We stated:

> The language of the subrogation provision at issue here unambiguously requires the Ryans to pay back all the money they received from the Plan. Since the Ryans have failed to establish that the Plan 'conflict[s] with the statutory policies of ERISA' and have similarly failed to show that the common law right at issue 'is necessary to . . . effectuate a statutory policy,' we must reject the Ryans' attempt to establish the common law right they would have us recognize.

Id. at 127 (citations omitted). We also held that "[e]nrichment is not 'unjust' where it is allowed by the express terms of the . . . plan." *Id.* (quoting *Cummings by Techmeier v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 390 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986)).

B.

Root argues *Ryan* is distinguishable because the subrogation provision in the Bollman plan is ambiguous and does not require full reimbursement. Whether an ERISA plan is ambiguous is a question of law. *See In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d 710, 715 (3d Cir. 1996).

We will look to the words of the Plan to make this determination. *See id.* ("[T]he parties remain bound by the appropriate objective definition of the words they use to express their intent.") (quoting *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1013 (3d Cir. 1980)); *Ryan*, 78 F.3d at 126. The Bollman plan requires reimbursement of "any payments" made by the Plan to a participant, and provides for subrogation to "all [of Root's] rights of recovery." As used in the plan, the words "any" and "all" both mean "the whole of" or "every." *Black's Law Dictionary* 74, 94 (6th ed.1990). Notwithstanding the universal scope of "any" and "all," Root attempts to distinguish the Bollman plan, which called for "100%" reimbursement. We see no distinction. On this point, we find the *Ryan* plan and the Bollman plan to be materially identical and the Bollman plan to be unambiguous.

Root also contends the Plan is ambiguous on Bollman's duty to pay Root's attorney's fees because it provides, "The Company shall pay fees and costs associated with the enforcement of the Plan rights." But the application of this provision is expressly limited to "enforcement of the Plan rights," i.e. actions in which the Plan enforces its own rights. It does not require the Plan to fund actions to enforce the independent rights of a plan beneficiary against a third party.

C.

Root maintains the Reimbursement Agreement he signed is ambiguous because it does not specifically address attorney's fees. But the Reimbursement Agreement requires reimbursement "up to the amount of such benefits paid." A plan or agreement need not specifically address attorney's fees in order to unambiguously require full reimbursement.[2]

IV.

The major thrust of Root's argument is that *Ryan* was incorrectly decided and should be overruled. *Amicus*, the Pennsylvania Trial Lawyers Association, also urges us to reconsider our holding in *Ryan*. Of course, a panel of our

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[2] Root also argues the Reimbursement Agreement is an unconscionable adhesion contract. But the parties' stipulations of fact, which were the sole factual basis for the district court's decision on summary judgment, do not contain facts necessary to support this argument. Generally we do not consider facts raised for the first time on appeal. *See Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994).

court cannot overrule a prior published decision.[3] Only the court en banc may do this. *See* Third Circuit I.O.P. 9.1.

Nonetheless, *amicus* contends *Ryan* will lead to inequitable results where a plan participant's third party recovery is less than the plan's subrogation claim plus attorney's fees. But Root's third party settlement fully

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[3] We note the holding in *Ryan* has support in the case law. *See Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298-99 (7th Cir.) (declining to adopt federal common law rule preventing full reimbursement where the clear language of an ERISA plan requires full reimbursement), *cert. denied*, 510 U.S. 916 (1993); *Blackburn v. Becker*, 933 F. Supp. 724, 729 (N.D. Ill. 1996) (employee may not withhold attorney's fees because "there is no reason to fiddle with an unambiguous plan provision which the parties freely entered into."); *Trident Reg'l Health Sys. v. Polin*, 948 F. Supp. 509, 514 (D.S.C. 1996) ("[F]ederal courts do not rewrite the unambiguous terms of an ERISA plan. . . . "); *Provident Life & Accident Ins. Co. v. Williams*, 858 F. Supp. 907, 912 (W.D. Ark. 1994) (allowing plan participants to withhold attorney's fees but recognizing that "if the right to reimbursement were contractually defined, the parties could expressly agree that reimbursement would be the first money out of the settlement monies with no deduction for attorneys fees and costs."); *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 958 (M.D. Ga. 1992) (holding plan participant may not withhold portion of attorney's fees where plan required full reimbursement). *But see Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir.) (requiring reimbursement under theory of unjust enrichment because ERISA indicates Congress's desire to ensure that plans are administered equitably and "that no one party, not even plan beneficiaries, should unjustly profit."), *cert. denied*, 498 U.S. 982 (1990); *Dugan v. Nickla*, 763 F. Supp. 981, 984-85 (N.D. Ill. 1991) (reducing reimbursement to reflect payment of attorney's fees, despite plan language requiring full reimbursement).

financed his attorney's fees and the subrogation claim. We will not address hypothetical scenarios.

Amicus also contends *Ryan* may hinder settlement of claims by plan participants against third parties. This prospect is troublesome. But *Ryan* holds only that we must uphold unambiguous plan terms that do not conflict with ERISA's statutory policies. Depending on the circumstances, parties to a subrogation agreement may still be able to negotiate compromises on attorneys' fees.

V.

Finally, Root raises an issue apparently not raised in *Ryan*. Citing the common law on subrogation, Root maintains that a subrogee may not recover more than the subrogor. Although his argument is not explicit, it appears Root advocates a pro rata reduction of the Plan's subrogation lien, i.e. the Plan's recovery should be limited, as Root's recovery was limited, by a pro rata portion of the attorney's fees. *See, e.g., Simmons v. Cohen*, 551 A.2d 1124, 1127 (Pa. Comm. Ct. 1988) (holding that, where welfare recipients sued to recover SSI awards which were subrogated to the state department of public welfare, the state department subrogee had common law duty to contribute to their legal expenses).

ERISA is silent on the issue of subrogation. *Ryan*, 78 F.3d at 127. We may adopt a common law principle only if "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) (quoting *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982)). Otherwise, we may not create substantive ERISA rights. *See Hamilton v. Air*

Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991) (Courts have "no authority to draft the substantive content in [ERISA] plans.") (quoting *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985)), *cert. denied*, 503 U.S. 938 (1992); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982).

Root has not established that full reimbursement of subrogation claims conflicts with ERISA's policies or that adoption of a pro rata reduction is necessary to effectuate these policies. In fact, the policies underlying ERISA generally counsel reliance on unambiguous plan language. *Van Orman*, 680 F.2d at 312 ("The Supreme Court has emphasized the primacy of plan provisions. . . . "). Although circumstances may arise necessitating a pro rata reduction in reimbursement, we find Root's argument in this case unconvincing.

VI. Conclusion

For the reasons stated, we will reverse the grant of summary judgment in favor of Root and remand to the district court to enter judgment in favor of Bollman. *See Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996).

TO THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

DATED:

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1191

BOLLMAN HAT COMPANY
v.
KEVIN T. ROOT;
DALE E. ANSTINE, P.C.

Bollman Hat Company, as sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 94-cv-07569)

Present: Sloviter, *Chief Judge*, Greenberg and Scirica, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 14, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 6, 1996, be, and the same is hereby reversed as to the grant of summary judgment in favor of Kevin T. Root and the cause is remanded to the District Court with direction to enter judgment in

favor of Bollman Hat Company. *See Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 3d Cir. 1996). All of the above in accordance with the opinion of this Court.

Attest:

/s/ P. Douglas Sisk
Clerk

Dated: April 18, 1997

Certified as a true copy and issued in lieu of a formal mandate on May 23, 1997

Teste: /s/ Illegible

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOLLMAN HAT COMPANY, Plaintiff	CIVIL ACTION No. 94-7569
v.	(Filed Feb. 5, 1996)
KEVIN T. ROOT and DALE E. ANSTINE, P.C., Defendants	

MEMORANDUM AND ORDER

HUYETT, J. **JANUARY 31, 1996**

The parties have stipulated to the facts and have submitted cross Motions for Summary Judgment. As the facts are not in dispute and Defendants Kevin T. Root and Dale E. Anstine, P.C. ("Anstine") are entitled to judgment as a matter of law, the Court will **GRANT** Defendants' Motion and **DENY** that of Plaintiff Bollman Hat Company.

I. FACTS

On August 21, 1992, Defendant Root was injured in a motorcycle accident. To cover medical treatment of his injuries, Root received $100,197.92 in health care benefits from the Bollman Hat Company Health and Welfare Benefits Plan ("the Plan"), a self-insurance plan sponsored by Plaintiff and regulated by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Under the terms governing the Plan, Root was required

to reimburse any benefit payments received "out of any monies recovered . . . as the result of judgment, settlement or otherwise." (Compl. Ex. A § 10.8 (Health Care Plan for Bollman Hat Co.); *See also* Compl. Ex. B (Reimb. Agree. of Dec. 12, 1992).) After receiving the $100,197.92 in health care benefits, Root entered into a settlement agreement for $215,000.00 with the person whose negligence caused the motorcycle accident.

Root then reimbursed the Plan $69,690.79, withholding $30,507.13 as the Plan's share of the attorney's fees and costs incurred in reaching the settlement.[1] Plaintiff brought this suit to recover the $30,507.13, which is held in escrow by Defendant Anstine.

II. DISCUSSION

As the facts are not in dispute and the sole issue before the Court is whether Root may deduct attorney's fees and costs from the amount reimbursed, disposition of this case by summary judgment is appropriate. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Neither the terms of the Plan nor the Reimbursement Agreement signed by Root address attorney's fees and costs. The ERISA statute is also silent on this point. However, courts that have addressed the issue have found that the beneficiary may reduce the amount to be reimbursed by reasonable fees and costs. *See Martz v.*

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[1] The parties stipulate that, if Root is entitled to withhold any amount for Plaintiff's share of attorney's fees and costs, $30,507.13 is the correct amount.

Kurtz, No. 94-1614, 1995 U.S. Dist. LEXIS 13635, at *22-24 (M.D. Pa. Aug. 1, 1995), *appeal docketed*, No. 95-7449 (3d Cir.); *Serembus v. Mathwig*, 817 F. Supp. 1414, 1423 (E.D. Wis. 1992); *Dugan v. Nickla*, 763 F. Supp. 981, 984-85 (N.D. Ill. 1991). This Court will do the same.

Congress intended ERISA funds to be administered equitably, with no party gaining an unjust profit. *Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Employers Pension Fund*, 847 F.2d 113, 121-22 (3d Cir. 1988), *cert denied*, 488 U.S. 1041 (1989); *Martz*, 1995 U.S. Dist. LEXIS 13635, at *23-24. Because of the litigation conducted by Root, Plaintiff has been reimbursed a substantial portion of the benefits it paid. Plaintiff would unjustly profit if Root were required to bear the entire financial burden of that litigation. *Martz*, 1995 U.S. LEXIS 13635, at *22-24. Accordingly, Root may withhold $30,507.13 as Plaintiff's share of the attorney's fees and costs, and Defendants are entitled to summary judgment. An appropriate Order follows.

/s/ Huyett
HUYETT, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOLLMAN HAT COMPANY,	:	CIVIL ACTION
Plaintiff	:	No. 94-7569
v.	:	
KEVIN T. ROOT and DALE E. ANSTINE, P.C.,	:	
Defendants	:	

ORDER

HUYETT, J. **JANUARY 31, 1996**

For the reasons discussed in the foregoing Memorandum, Defendants' Motion for Summary Judgment is **GRANTED**, and Plaintiff's Motion for Summary Judgment is **DENIED**. Judgment is entered in favor of Defendants and against Plaintiff.

IT IS SO ORDERED.

/s/ Huyett
HUYETT, J.

ENTERED: 2/6/96
CLERK OF COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1191

BOLLMAN HAT COMPANY
v.
KEVIN T. ROOT;
DALE E. ANSTINE, P.C.

Bollman Hat Company, as sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Appellant

(D.C. Civ. No. 94-cv-07569)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS and McKEE, *Circuit Judges*.

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

panel and the Court in banc, is denied. Judge Becker would grant rehearing.

BY THE COURT,

/s/ Illegible
Circuit Judge

Dated: May 15, 1997

by/cc: JFH
SMR
TLPL
WCP
JMM

APPENDIX E

Sept. 2 P.L. 93-406

RETIREMENT INCOME SECURITY ACT

TITLE I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A – GENERAL PROVISIONS

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce: that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially

affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with

significant periods of service to meet minimum standards of funding, and by requiring plan termination insurance.

Supreme Court, U.S.
FILED
OCT 1 1997
CLERK

(2)

No. 97-0480

In The

Supreme Court of the United States

October Term, 1996

KEVIN T. ROOT and DALE E. ANSTINE, P.C.,

Petitioners,

v.

BOLLMAN HAT COMPANY, as Sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Respondent.

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Third Circuit opinion is reported at 112 F.3d 113. This brief cites to the page numbers in the Opinion attached to Petitioner's brief at Appendix A.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE SEVENTH CIRCUIT'S RULING IN *BLACKBURN*

Petitioner rests his entire petition on his mistaken assertion that the Third Circuit Court of Appeals' decision below conflicts with the Seventh Circuit's decision in *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997). However, *Blackburn* was decided on the issue of lack of subject matter jurisdiction, not subrogation or ERISA preemption. *Id.* at 494-495. Subject matter jurisdiction is not at issue in Petitioner's case. In *Blackburn*, the Seventh Circuit's only comments regarding ERISA preemption and the Illinois common-fund doctrine were in the form of *obiter dicta* as "[y]et another consideration . . . " *Id.* at 495. Because the Seventh Circuit had already decided the district court lacked the prerequisite subject matter jurisdiction, the opinion regarding the state common-fund doctrine was unnecessary and not binding. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1129 (1996).

Obviously, an alleged conflict with *dicta* from a Seventh Circuit Court of Appeals' opinion regarding Illinois' common-fund doctrine does not create a conflict between the circuits warranting Supreme Court review.

II.

THE SEVENTH CIRCUIT'S *DICTA* IN *BLACKBURN* DOES NOT CONFLICT WITH *BOLLMAN HAT.*

Even assuming *arguendo* that the Seventh Circuit's comments regarding ERISA preemption were not *dicta,* the petitioner still has failed to cite a conflict because *Blackburn* expressly allows for the result reached in *Bollman Hat.* Although the Seventh Circuit ruled that the common-fund doctrine was not preempted by ERISA under the facts presented in *Blackburn,*[1] the Court noted that an ERISA plan with appropriate terms could avoid the Illinois common-fund doctrine:

> A plan might have a better argument if its governing documents expressly required participants to pay their own legal fees (alternatively, to hire only attorneys who agree to waive the common-fund doctrine) and to remit the gross rather than the net proceeds from litigation. ERISA permits a medical plan to pay a fraction of the costs, requiring a copayment from the beneficiary. . . . A plan that nominally pays 100

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[1] The terms of the benefits plan in *Blackburn* were not discussed in the opinion, but the court made clear that the plan did not expressly address, one way or another, whether the plan would be entitled to recoup 100 percent of its funds from any recovery or whether it would have to pay a share of attorneys' fees and costs.

> percent of medical costs incurred following accidents, and then requires participants to hire counsel, initiate litigation, and remit any recovery (bearing costs of counsel themselves), has effectively agreed to insure only part of the real cost of care, although it advances the full cost while the participant tries to find other sources of payment. . . . A state's refusal to respect such a provision might be deemed equivalent to a direction that the plan pay all, rather than part, of the medical costs of accidents. But Sundstrand's plan does not have such a requirement, Illinois has not attempted to override it, and there will be time to cross that bridge when we come to it.

Id. at 496. By this language the Seventh Circuit left open the possibility that the common-fund doctrine would not apply due to the express provisions of an ERISA plan. The Bollman Hat ERISA plan, unlike the one in *Blackburn*, contained such express provisions. Bollman Hat's plan included "unambiguous terms" requiring reimbursement of "any payments" and "all" funds recovered from third parties, without reduction for attorney's fees and costs. Petition at 2; Opinion at App. 8. It thereby created the type of "requirement" outlined in *Blackburn* that would trump the state's common-fund doctrine and allow the plan to receive full reimbursement, without a deduction for attorney's fees and costs. As such, the opinion in *Bollman Hat* harmonizes perfectly with *Blackburn*, and no conflict exists to justify Supreme Court review.

III.

THE THIRD CIRCUIT'S DECISION CONFORMS WITH SUPREME COURT PRECEDENT REGARDING ERISA PREEMPTION, INCLUDING *FMC CORP. V. HOLLIDAY,* AND A REVERSAL WOULD CREATE INCONSISTENT AND UNPREDICTABLE STANDARDS.

This Court, following the mandate of ERISA, 29 U.S.C. § 1144(a), has established a consistent and well-reasoned body of law regarding preemption of state law "relating to" an ERISA plan. *See, e.g., FMC Corp. v. Holliday,* 498 U.S. 52 (1990); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987). More particularly, this Court has ruled that ERISA preempts state laws regarding subrogation comparable to the one challenged here. *FMC Corp., supra.* Petitioner presents no distinction or reason to justify variance from these precedents or Congress' mandate of preemption. To allow a special exception for Pennsylvania's common-fund doctrine would lead to a bewildering array of state-law exceptions to ERISA preemption, which would defeat Congress' purpose of creating a uniform federal law for such plans. *Pilot Life Ins.,* 481 U.S. at 46.

Because there is no compelling reason to vary from the established law or the terms of the plan, the petition for review should be denied.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted

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